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Supreme Court, U.S.
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No. 85-1680

In The
Supreme Court of the United States
October Term, 1985

E.B.,

Petitioner,

v.

BURLINGTON COUNTY WELFARE AGENCY,
and THE DIRECTOR,
DIVISION OF PUBLIC WELFARE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

Petitioner seeks review, by writ of *certiorari,* of a decision of the Appellate Division of the Superior Court of New Jersey that determined a mortgage taken in the name of E.B.'s daughter was an available resource which precluded payment of medicaid benefits to E.B. The Supreme Court of New Jersey declined to grant a petition for certification from the decision of the Appellate Division.

The sole issue presented to the Appellate Division was whether a mortgage representing the proceeds of a sale of E.B.'s family home is a resource available to E.B. even though her daughter, Mrs. Ash, placed the mortgage in her own name without reference to her alleged status as attorney in fact. No constitutional issue was raised to the Appellate Division. Counsel for respondent argued in opposition to the subsequent Petition for Certification that any constitutional issue had been waived by E.B.'s failure to raise the issue below.

Facts pertinent to the legal issues were adduced at a fair hearing. E.B. and her husband owned and lived in a house in Mount Holly, New Jersey, until July 1976 when they went to live with their daughter, Ruth Ash. In February 1981, E.B.'s husband executed a general power of attorney to his daughter, Ruth Ash. E.B. did not execute a power of attorney, although Mrs. Ash testified at the fair hearing that one existed.

In 1981 Mrs. Ash signed an agreement for the sale of the parents' home to an unrelated third party. The agreement stated Mrs. Ash acted as attorney in fact for E.B. and her husband.

Title was transferred in 1983 and the deed recites that Mrs. Ash acted as attorney in fact. When the title was transferred, Mrs. Ash received a mortgage from the purchasers for $50,000. The mortgage does not recite that Mrs. Ash acted as attorney-in-fact for her parents, but lists Mrs. Ash as the mortgagee.

On June 13, 1984 Ms. Ruth Ash applied for medicaid only benefits for E.B. and her father. The application form listed interest income to E.B. of $200 per month from this mortgage. The welfare agency extended medicaid benefits, but pursued investigation of this mortgage as a possible resource subject to liquidation. On July 16, 1984 E.B. and her husband were placed in a nursing home and the welfare agency was so notified. The Agency notified Mrs. Ash by telephone that the proceeds from the sale of the family home would be counted as a resource. E.B.'s husband died shortly after entering the nursing home.

On October 5, 1984 a county welfare worker advised Ms. Ash that regulations governing medicaid only eligibility required liquidation of the mortgage note. On February 14, 1985 the agency notified E.B. that the medicaid benefit would terminate on February 28, 1985 due to her failure to cooperate in liquidating the mortgage.

On March 12, 1985 a fair hearing was held. E.B. did not appear at the hearing, but her daughter appeared and represented to the court that she had a power of attorney for her mother. The daughter also characterized her mother as senile. Counsel for the petitioner, E.B., appeared with Mrs. Ash at the hearing, and subsequently confessed to the Appellate Division of the State Court that he represented both Mrs. Ash and E.B.

From testimony at the hearing, the ALJ found that Ms. Ash conveyed E.B.'s home on April 1, 1983, that the mortgage in Mrs. Ash's name represented the proceeds of the sale of E.B.'s home, that Ms. Ash had been given a power of attorney by E.B. and that Ms. Ash refused to liquidate the mortgage. Although finding that the mortgage represented assets of the parents, the Judge also found that the mortgage document did not recite that Mrs. Ash acted as an attorney-in-fact. The ALJ concluded that the mortgage was a resource not available to Mrs. Boyd since her daughter refused to liquidate. In discussing his finding the judge determined that he was powerless to affect the ownership of the mortgage and reluctantly concluded that the mortgage was not a resource available to Mrs. Boyd.

On April 26, 1985, the Director of the Division of Public Welfare rejected the initial decision finding that the mortgage represented an available resource. The Director reasoned that Mrs. Ash acted as an agent for her mother and therefore her acts are attributable to the mother. In addition, the Director rejected the finding that E.B. was incompetent since the record was devoid of any evidence to that effect.

In a written opinion filed October 9, 1985, the Appellate Division affirmed the decision of the Director. The court held that sufficient credible evidence supported the Director's determination that E.B. owned the mortgage and that the resource was available based upon the agency relationship.

Counsel for E.B. then filed a petition for certification to the Supreme Court of New Jersey arguing that

the Director's decision violated equal protection of the laws. Counsel for respondents argued that this issue had not been raised to the appellate court and that failure required a dismissal of the petition. The Supreme Court denied the petition without comment.

ARGUMENT

A. THIS PETITION IS WITHOUT MERIT FOR THE COURTS BELOW CORRECTLY DETERMINED THAT THE MORTGAGE IS E.B.'S ASSET AND THIS DETERMINATION IS CONSISTENT WITH 42 U.S.C. § 1396(a)(17).

The State of New Jersey has elected to participate in the Medicaid programs established as Title XIX of the Social Security Act, 42 *U.S.C.* § 1396 *et seq.* Pursuant to the State's election and the plan submitted to the Department of Health & Human Services, medically needy persons apply for benefits through county welfare agencies (hereinafter CWA). The CWA makes an initial determination of eligibility which the client may contest by requesting a fair hearing. *N.J.A.C.* 10:94-8.4. The final decision on any issue is made by the Director of the single state agency charged with supervision of the program. *Id.*

Eligibility for medicaid clearly depends upon the income and resources of the applicant. *See* 42 *U.S.C.* § 1396a (a)(17)(B); *Hedgebeth v. Medford*, 74 *N.J.* 360, 364 (1977). Standards of eligibility are prescribed by the Secretary of the Department of Health and Human Services. The controlling federal regulation states in part:

> To determine eligibility on the basis of resources for medically needy individuals, the Agency must (a) consider only the individual's resources and those that are considered available to him under the financial responsibility requirements for relatives under § 436.82. [45 *C.F.R.* § 436.845].

In New Jersey, applicants for medicaid may hold resources valued at $1,600 for an individual. *N.J.A.C.* 10:94-4.5(c). This resource limit applies to individuals in long-term care facilities. *N.J.A.C.* 10:94-4.5(d). Resources exceeding the limit must be liquidated and the proceeds applied to support the applicant. *N.J.A.C.* 10:94-4.3. The instant case arose within this context. Petitioner, upon applying for benefits, was called upon to liquidate a mortgage with a value in excess of $1500, to retain qualification for assistance. Based upon evidence adduced at a fair hearing and in accordance with New Jersey's concepts of title, the Director of the Division determined that E.B. owned the mortgage despite the daughter's attempt to subvert the proceeds to her own purposes.

Petitioner's characterization of the issue for review by this Court seriously distorts the factual picture available to the Director and the courts below. The daughter who has supposedly absconded with the mortgage, made the application for E.B.'s medicaid benefits and listed the mortgage income as E.B.'s asset. The daughter was noticed of the fair hearing questioning the liquidation requirement and appeared without her mother. The attorney who presents this petition, accompanied the daughter to the hearing. At the hearing the daughter testified she sold her parents' house based upon a power of attorney from the mother and father. The daughter also contended

she was the true owner of the property because her father had said he wanted her to have it. Based upon the daughter's testimony and the documents in evidence, the Director determined that the daughter acted as a fiduciary for the mother, E.B., and that the daughter held the mortgage in trust. The Appellate Division affirmed.

Thus petitioner's argument that the State courts relied upon form over substance is correct, but meaningless. Under tenets of property law and agency E.B. owns the mortgage at issue. This court, in a different factual context, has approved the concept of "deeming" of resources between spouses noting that in eligibility determinations "available [resources] are different than from those in hand." *Schweiker v. Gray Panthers*, 453 *U.S.* 34, 48 (1981). Thus, within limits, the concept of availability of resources is one of form over substance.

But the substance of this case also belies petitioner's arguments. In this case the daughter has consistently acted on behalf of her mother: first, in applying for benefits; second, in placing the mother in a nursing home; third, in appearing for her mother at the fair hearing; fourth, in obtaining counsel. The representation to this Court, that the daughter has stolen the mortgage, does not even accord with the daughter's conduct.

Petitioner concludes that the determination of eligibility in medicaid cases affects a significant proportion of the population. Even so, the determination at issue here raises no substantial federal question. Each eligibility determination is inextricably tied to the questions of an individual's resources, how and with whom they are owned. Nothing in the facts adduced below merits

consideration in this court of the eligibility procedure or the Director's decision.

B. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL ISSUE TO THE STATE'S APPELLATE DIVISION THEREBY WAIVING THE RIGHT TO REVIEW.

This Court's jurisdiction to review this case arises under 28 *U.S.C.* § 1257(3) which concerns federal rights and privileges that have been specially set up or claimed and upon which there has been a final decision of the state's highest court. *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969). The constitutional question presented by petitioner was not raised before the Appellate Division of the Superior Court of New Jersey and is thus not a proper issue before this court.

Petitioner first sought to raise this issue in a petition for certification to the Supreme Court of New Jersey and respondents objected. Issues not raised in the lower courts of New Jersey are generally not considered on appeal unless the newly stated issue involves the court's jurisdiction or a matter of great public interest. *Deerfield Estates, Inc. v. Tp. of East Brunswick,* 60 *N.J.* 115, 120 (1972). *Ferraro v. Demetrakis,* 167 *N.J. Super.* 429, 431 (App. Div. 1979) *certif.* denied 81 *N.J.* 290 (1979).

Notwithstanding this procedural consideration, petitioner's statement of an equal protection issue is patently without merit. No arbitrary classification has been imposed upon this applicant for medicaid assistance. As any other applicant, her resources and income must be examined to determine eligibility. E.B. by virtue of her ownership of the mortgage becomes ineligible for medi-

caid because she is less indigent than regulations permit. This Court has recognized that welfare programs involve limited resources necessitating eligibility determinations and classifications. See generally *Schweiker v. Gray Panthers, supra* at 48; *Dandridge v. Williams,* 397 *U.S.* 471, 485 (1970). Eligibility criteria are the basic factors in distributing limited resources to the needy and create the most rational classification: needy v. less needy.

This petition for a writ of *certiorari* thus does not raise a question of constitutional dimension which warrants this court's review. The petition should be denied.

—o—

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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